Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

STATE OF NORTH CAROLINA,

Petitioner,

v.

MONICA D. BRANCH,

Respondent.

On Petition for Writ of Certiorari to the
North Carolina Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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July 26, 2005

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QUESTION PRESENTED

I. Whether the North Carolina Court of Appeals' Ruling That the Constitution Requires Law Enforcement Officers to Have Reasonable Suspicion of Criminal Drug Activity to Conduct a Dog Sniff of the Exterior of a Car Lawfully Detained During a License Check at a License Checkpoint Directly Conflicts With This Court's Decision in *Illinois v. Caballes*, ___ U.S. ___, 125 S. Ct. 834 (2005)?

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TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CASES AND AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

I. Facts of the Case 1
II. Trial Court Proceedings 5
III. The Decision of the North Carolina Court of Appeals 5
IV. The Decision of the Supreme Court of North Carolina 7

REASONS WHY WRIT SHOULD BE GRANTED 7

The North Carolina Court of Appeals' Ruling Directly Conflicts With This Court's Decision in *Illinois v. Caballes*, ___ U.S. ___, 125 S. Ct. 834 (2005). 8

CONCLUSION 10

TABLE OF CASES AND AUTHORITIES

Florida v. Rabb, ___ U.S. ___, 125 S. Ct. 2246 (2005) .. 10

Florida v. Royer, 460 U.S. 491 (1983) 6

Illinois v. Caballes, ___ U.S. ___,
125 S. Ct. 834 (2005) 7,8,9,10

In re Murray, 136 N.C. App. 648,
525 S.E.2d 496 (2000) 8

Siler v. Ohio, ___ U.S. ___, 125 S. Ct. 671 (2004) 10

State v. Branch, 162 N.C. App. 707,
591 S.E.2d 923 (2004) 1,6,9

State v. Branch, 358 N.C. 236,
2004 N.C. LEXIS 200 (2004) 7

State v. Branch, 359 N.C. 406, 610 S.E.2d 198 (2005) 1

State v. Branch, No. 95PA04,
2005 N.C. LEXIS 451 (N.C. Apr. 26, 2005) 7

State v. Garner, 331 N.C. 491, 417 S.E.2d 502 (1992) 8

STATUTES

28 U.S.C. § 1257 1

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals, *State v. Branch*, 162 N.C. App. 707, 591 S.E.2d 923 (2004), is included at App. pp. 1-11.

The opinion of the Supreme Court of North Carolina, *State v. Branch*, 359 N.C. 406, 610 S.E.2d 198 (2005), is included at App. pp. 12-13.

The order denying the State's motion for reconsideration is included at App. p. 14.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV of the United States Constitution provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

Amendment XIV of the United States Constitution provides in pertinent part: "Nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

I. Facts of the Case

On November 3, 2000, Rockingham County Sheriff's Deputy Marcus Marshall was working as a member of the Community-Oriented Policing Unit ("COP") conducting a driver's license checkpoint in conjunction with about twenty other Rockingham County Sheriff's Deputies and two canine (K-9) officers. (Hearing Transcript ("HT") pp. 3-4) The COP unit works to protect and secure citizens of Rockingham County through public relations, interacting with citizens and

businesses, as well as investigating street level narcotics activity. (HT pp. 16, 18) The license checkpoint was set up at the intersection of Bethlehem Church Road and Harrington Highway, with officers stopping all vehicles that entered the intersection as well as those exiting Highway 87 and Highway 14 onto Harrington Highway. (HT pp. 5, 8-11) The checkpoint was approved by Sergeant Jerry Fowler, who coordinates all checkpoints with the captain, the major, and other sergeants. It lasted from ten p.m. until approximately two a.m. (HT pp. 20-21, 37)

During this license check every vehicle entering the intersection was stopped for approximately 40 seconds during which time the driver was asked to produce a driver's license and vehicle registration. (HT pp. 6, 22, 35) The driver could be detained for further questioning, which could extend the duration of the stop, if she did not have a driver's license, presented a license or registration with violations, had outstanding warrants, or if the officers detected an odor of alcohol or an illegal substance. (HT pp. 15-16) The Department used about twenty officers to keep traffic flowing in all directions as much as possible. (HT p. 22)

The K-9 officers were present to aid officers who observed circumstances which warranted a canine sniff of a vehicle. (HT pp. 16, 37-38) The two K-9 officers worked all four of the checking areas and would go where needed if called by another officer. (HT pp. 37-38)

At approximately eleven p.m. Deputy Marshall stopped the defendant, Monica Branch, at the license checkpoint. (R p. 4) As with every other driver that passed through the license checkpoint, Branch was asked if she had a driver's license and vehicle registration. (HT p. 24) Branch presented Deputy Marshall with a duplicate driver's license and a vehicle registration. (HT p. 24) Deputy Marshall decided to question Branch further because of her presentation of a duplicate license. (HT pp. 24-26) His past experience as a law

enforcement officer indicated that often people who presented duplicate driver's licenses were actually driving while their license was revoked. (HT pp. 24-25) Deputy Marshall also asked Branch to pull over, because, due to his prior interactions with her, he believed there were possible outstanding warrants for her and he wanted to ascertain whether they had been served. (HT pp. 26-27)

After he asked Branch to pull over, Deputy Marshall began walking toward his own vehicle to check the validity of defendant's driver's license, which he had with him, as well as to check for the outstanding warrants. (HT pp. 26, 34) As Deputy Marshall returned to his vehicle, he spoke with K-9 Deputy Randy Howell. He informed Deputy Howell that he had requested Branch to pull over and was preparing to check the validity of her driver's license as well as to check for outstanding warrants. (HT pp. 28-29) Deputy Marshall knew Branch had possessed and used illegal substances before. He asked Deputy Howell, a K-9 officer, to step over to the vehicle. (HT pp. 29-32)

Deputy Howell was also familiar with Branch. Upon seeing the duplicate driver's license defendant had presented to Deputy Marshall, Deputy Howell also believed the license's validity should be checked, as he had previously charged Branch with a violation for which her driver's license was revoked, and he suspected that it might still be revoked. (HT pp. 45-46, 50-51) Deputy Howell made his inquiry with Branch while Deputy Marshall was at his vehicle calling Communications to check Branch's driver's license and outstanding warrants. (HT pp. 31-32)

It took Deputy Marshall about five minutes to confirm the validity of Branch's driver's license and to determine whether her outstanding warrants had been served. (HT p. 36) While Deputy Marshall was on the radio checking with Communications, Deputy Howell walked his dog "Toon" around the perimeter of Branch's vehicle, because he had

experience with her in the past in which she had possessed drug paraphernalia. The dog alerted to the presence of the odor of narcotics during the time Deputy Marshall was checking the status of Branch's license and outstanding warrants. (HT pp. 31-33, 40-42, 46)

After "Toon" alerted to the presence of the odor of narcotics, Deputy Howell returned the dog to his vehicle and spoke with Deputy Marshall, who informed him Branch's driver's license was valid and the warrants had previously been served. (HT pp. 26, 28, 32, 44) Deputy Howell advised Deputy Marshall that Toon alerted to the odor of narcotics in Branch's vehicle. (HT p. 33) Deputy Howell informed Branch that the dog alerted and asked Branch and her passenger to get out of the vehicle. (HT p. 44) Deputy Howell searched the vehicle and found marijuana stems and portions of marijuana cigarettes in the ashtray. (HT pp. 44-45)

When Branch got out of the vehicle, she removed a pocketbook. (HT p. 47) After his initial search of the vehicle, Deputy Howell inquired as to the ownership of the pocketbook. (HT p. 54) Branch denied ownership. Deputy Howell then searched the pocketbook. In it he found two plastic containers: a white bottle containing .6 grams of marijuana and a brown prescription bottle, with Branch's name on the label, containing medication. (HT pp. 47-48; Plea Transcript ("PT") p. 8) Branch then acknowledged that the pocketbook was hers. (HT p. 48) Following the discovery of the marijuana in Branch's purse, a female officer searched Branch incident to arrest. Based on prior encounters with Branch, Deputy Howell believed that Branch might have cocaine in her brassiere. (HT pp. 48, 53) When the brassiere was pulled away from Branch's body, a packet containing .3 grams of crack cocaine fell out. (HT p. 48; PT p. 8) Branch never objected to the search of her vehicle, purse, or person. (HT pp. 49-50)

II. Trial Court Proceedings

Monica D. Branch was arrested on November 3, 2000 and charged with misdemeanor possession of less than one-half ounce of marijuana and felony possession of cocaine. (R pp. 2-4) On April 2, 2001, the grand jury of Rockingham County indicted Branch for the felony of possession of cocaine. (R p. 5) On August 8, 2001, Branch filed a Motion to Suppress the drugs seized from her vehicle and her person on November 3, 2000. The motion raised the constitutionality of the stop, seizure, and search under both the North Carolina Constitution and the Fourth and Fourteenth Amendments to the Constitution of the United States. (R pp. 7-9) The hearing concerning the motion to suppress occurred on October 5, 2001 in Rockingham County Superior Court before the Honorable Anthony M. Brannon. (R p. 10) In an Order signed on August 27, 2002, Judge Brannon found no constitutional violation and denied Branch's motion to suppress. (R pp. 10-16) On October 15, 2002, before the Honorable Meltzer A. Morgan, Jr., Branch pled guilty to the felony of possession of cocaine and to the misdemeanor of possession of marijuana and reserved her right to appeal the order denying her suppression motion. (R pp. 17-20; PT pp. 2-11) Judge Morgan sentenced Branch to a suspended sentence of 5-6 months in prison and placed her on supervised probation for 18 months. Branch gave oral notice of appeal in open court immediately after judgment. (PT p. 11)

III. The Decision of the North Carolina Court of Appeals

On February 17, 2004, the North Carolina Court of Appeals issued an opinion reversing Judge Brannon's August 27, 2002 Order denying Branch's motion to suppress. (Pet. App. pp. 1-11) The court found that the license checkpoint was constitutionally permissible, (Pet. App. pp. 7-8), and that the officers had reasonable suspicion to detain Branch past the initial stop to determine the validity of her license. (Pet. App.

pp. 8-9) However, the court also held that the dog sniff of the exterior of Branch's car while she was being legitimately detained to check the validity of her license, conducted without reasonable suspicion of additional criminal activity, was unconstitutional. (Pet. App. pp. 9-10)

In its analysis, the court cited one of its prior opinions, in which it had relied on reasoning in this Court's opinion in *Florida v. Royer,* and it cited the following excerpt from *Royer*:

> An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time . . . It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.
>
> *Florida v. Royer*, 460 U.S. 491, 501 (1983).

(Pet. App. p. 10). Based on this Court's reasoning in *Royer*, the court went on to find that the dog sniff of Branch's car exceeded the purpose and scope of the legal detention for license verification, stating that "[a]llowing the dog sniff of defendant while she was detained on suspicion of carrying an invalid license would not be consistent with this reasoning." *Id.* It found that the trial court erred "in finding that no reasonable suspicion was necessary to conduct the dog sniff and subsequent searches." *Id.*

On April 1, 2004, the Supreme Court of North Carolina issued Orders allowing the State's petition for discretionary review, allowing the State's petition for writ of supersedeas,

and denying Branch's petition for discretionary review. *State v. Branch*, 358 N.C. 236, 2004 N.C. LEXIS 200 (2004).

IV. The Decision of the Supreme Court of North Carolina

On April 7, 2005, the Supreme Court of North Carolina issued a *per curiam* decision stating, "Discretionary Review Improvidently Allowed." (Pet. App. pp. 12-13)

On April 25, 2005, the State of North Carolina filed in the Supreme Court of North Carolina a Motion to Stay Mandate, to Reconsider, or to Remand to Court of Appeals, requesting reconsideration by the Supreme Court or the Court of Appeals in light of this Court's opinion in *Illinois v. Caballes*, ___ U.S. ___, 125 S. Ct. 834 (2005).

On April 26, 2005, the Supreme Court of North Carolina denied the State's Motion to Reconsider. (Pet. App. p. 14)

Final mandate and judgment issued by Rule on April 27, 2005. N.C. R. App. P. 32.

REASONS WHY WRIT SHOULD BE GRANTED

The opinion of the North Carolina Court of Appeals that officers were not constitutionally permitted, without reasonable suspicion of criminal activity, to conduct a dog sniff for drugs around the perimeter of Branch's car while they were lawfully checking the validity of her license at a license checkpoint directly contravenes the recent holding of this Court that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." *Illinois v. Caballes*, ___ U.S. ___, ___ 125 S. Ct. 834, 838 (2005).

The North Carolina Court of Appeals' Ruling Directly Conflicts With This Court's Decision in *Illinois v. Caballes*, ___ U.S. ___, 125 S. Ct. 834 (2005).

The North Carolina Court of Appeals did not distinguish between Branch's state and federal constitutional claims. The North Carolina appellate courts have not interpreted North Carolina's Constitution to enlarge or expand rights beyond those afforded in the Fourth Amendment to the Constitution of the United States. *See State v. Garner*, 331 N.C. 491, 506-07, 417 S.E.2d 502, 510 (1992); *In re Murray*, 136 N.C. App. 648, 652, 525 S.E.2d 496, 500 (2000).

The opinion below was rendered without benefit of this Court's opinion in *Illinois v. Caballes*.

In *Caballes*, this Court was faced with the question of "[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." *Caballes*, 125 S. Ct. at 837. This Court accepted the state court's conclusion that "the duration of the stop . . . was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop." *Id.* Reviewing the lower court's finding that "the use of the dog converted the citizen-police encounter from a lawful traffic stop into a drug investigation" and its determination that such a "shift in purpose was not supported by any reasonable suspicion that respondent possessed narcotics" this Court held that "conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy." *Id.* Because "any interest in possessing contraband cannot be deemed 'legitimate,'" and because "governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest,'" *Id.*, this Court further held that the use of a well-trained narcotics-detection

dog to sniff the exterior of a car during a lawful seizure of a traffic stop did not implicate legitimate privacy interests and did not rise to the level of a constitutionally cognizable infringement. *Id.* at 838.

Here, as in *Caballes*, the state appellate court held that the motorist was temporarily detained for lawful purposes pursuant to a traffic stop, that the dog sniff of the exterior of the vehicle was conducted during the period of the lawful detention, and that there were no facts justifying a reasonable suspicion of criminal drug activity. Here, as in *Caballes*, the state appellate court held that reasonable suspicion of criminal drug activity was necessary to permit police to conduct a dog sniff of the exterior of a car lawfully detained during a traffic stop.

This Court has held that the Illinois Supreme Court incorrectly determined that a dog sniff was not permissible while a vehicle was lawfully detained during a traffic stop for speeding. The difference between a traffic stop for speeding in *Caballes* and a traffic stop to check the validity of a license in this case should not affect the constitutional validity of a dog sniff of the exterior of Branch's car.

The North Carolina Court of Appeals incorrectly held that "[t]he time needed to verify defendant's credentials is not a time during which officers may investigate any possible criminal activity while the defendant is immobilized." *Branch*, 162 N.C. App. at 713-14, 591 S.E.2d at 926-27. That court also incorrectly held that a reasonable suspicion of criminal activity was required to constitutionally justify a dog sniff of the exterior of a vehicle during lawful detention at a traffic stop. *Id.* That court is in error because "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment" and does not require reasonable suspicion of criminal activity to be constitutionally permissible. *Caballes*, 125 S. Ct. at 848.

The opinion of the court below is in error in light of this Court's opinion in *Caballes* and stands uncorrected as a final judgment in this case.

This Court should accept this case for summary review, vacate the judgment, and remand the case to the North Carolina Court of Appeals for reconsideration in light of this Court's decision in *Caballes*. *See Siler v. Ohio*, ___ U.S. ___, 125 S. Ct. 671 (2004) (judgment vacated and case remanded to the lower court for reconsideration in light of *Crawford v. Washington*); *Florida v. Rabb*, ___ U.S. ___, 125 S. Ct. 2246 (2005) (judgment vacated and case remanded to the lower court for reconsideration in light of *Caballes*).

CONCLUSION

By issuing its opinion that discretionary review of the opinion of the Court of Appeals was improvidently allowed and by denying the State of North Carolina's motion to reconsider or to remand to the court below for reconsideration in light of *Caballes*, the Supreme Court of North Carolina has allowed to stand as the law in North Carolina a published opinion that directly contravenes this Court's opinion in *Caballes* and directly conflicts with the law in other jurisdictions across the United States. This Court should review and summarily vacate the decision of the North Carolina Court of Appeals in this case and remand the case to that court for reconsideration in light of this Court's opinion in *Caballes*.

Respectfully submitted,
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July 26, 2005

**Counsel of Record*

APPENDIX

TABLE OF CONTENTS

State of North Carolina v. Monica D. Branch,
162 N.C. App. 707, 591 S.E.2d 923 (2004) .... APP. 1

State of North Carolina v. Monica D. Branch,
359 N.C. 406; 610 S.E.2d 198 (2005) ..... APP. 12

State of North Carolina v. Monica D. Branch,
2005 N.C. LEXIS 451 ..... APP. 14

State of North Carolina v. Monica D. Branch,
162 N.C. App. 707, 591 S.E.2d 923 (2004)

STATE OF NORTH CAROLINA
v.
MONICA D. BRANCH

NO. COA03-350

COURT OF APPEALS OF NORTH CAROLINA

162 N.C. App. 707*; 591 S.E.2d 923**;
2004 N.C. App. LEXIS 254*

December 3, 2003, Heard in the Court of Appeals
February 17, 2004, Filed

COUNSEL: Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan, for the State.

Assistant Appellate Defender, Barbara S. Blackman, for the defendant-appellant.

JUDGES: ELMORE, Judge. Judges BRYANT and CALABRIA concur.

OPINION BY: ELMORE

OPINION:

[*708] [923]** *Appeal by defendant from order denying her motion to suppress entered 29 August 2002 by Judge*

State of North Carolina v. Monica D. Branch,
162 N.C. App. 707, 591 S.E.2d 923 (2004)

Anthony M. Brannon in Rockingham County Superior Court. Heard in the Court of Appeals 3 December 2003.

[924]** ELMORE, Judge.

Monica D. Branch (defendant) was stopped at a "license and registration" checkpoint by Deputy Marshall of the Rockingham County Community-Oriented Policing Unit. Defendant produced a duplicate driver's license and a registration. Deputy Marshall was suspicious of the duplicate license, and suspected that she had outstanding warrants based on his prior knowledge of the defendant and that her license may have been revoked. Deputy Marshall pulled defendant out of the checkpoint and called in a license and warrant check. Deputy Marshall called over Deputy Howell **[***2]** to make inquiry of defendant while the checks were being performed. Deputy Howell, a K-9 officer, walked his dog around the perimeter of defendant's car while the checks were being performed. The dog alerted to the presence of narcotics. Deputies Marshall and Howell ordered defendant and her passenger out of the car and searched the car. Deputy Howell found marijuana stems and butts in the ashtray. He seized a purse lying on the front seat, which defendant denied was hers. Defendant later acknowledged ownership of the purse when Deputy Howell found marijuana in a non-transparent plastic container in the purse. Deputy Howell asked a female officer to search **[*709]** defendant, as he believed, based on prior contact with her, that defendant carried cocaine in her brassiere. The officer found a packet of cocaine in defendant's brassiere. At no time did defendant consent to the searches.

***State of North Carolina v. Monica D. Branch*,**
162 N.C. App. 707, 591 S.E.2d 923 (2004)

Defendant was charged with misdemeanor possession of marijuana and felony possession of cocaine. Defendant moved to suppress the evidence of the drugs found in the search. The motion was denied by the trial court. Defendant preserved her right of appeal before she pled guilty to the charges. She now brings this [***3] appeal.

We note that the trial court's ruling on a motion to suppress is afforded great deference upon appellate review, as the trial court has the duty to hear testimony and weigh the evidence. *State v. Johnston,* 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994). But while the trial court's findings of fact may be binding on appeal, we review its conclusions of law *de novo*. *State v. Mahaley,* 332 N.C. 583, 423 S.E.2d 58 (1992). We must not disturb the court's conclusions if they are supported by the court's factual findings. *State v. Cooke,* 306 N.C. 132, 291 S.E.2d 618 (1982).

Defendant assigns error to the denial of the motion to suppress, arguing first that her seizure at an unconstitutional checkpoint and illegal detention following her presentation of a valid driver's license deprived her of her freedom from unreasonable searches and seizures under the United States and North Carolina Constitutions. We agree.

The trial court made the following findings of fact relevant to the issue before us:

> 5. That all vehicles entering the intersection, from both directions, on each road, were stopped and all drivers were required [to] [***4] produce a valid driver's license and registration.
>
> . . . .

***State of North Carolina v. Monica D. Branch*, 162 N.C. App. 707, 591 S.E.2d 923 (2004)**

8. That Deputy Marshall testified a K-9 unit is normally available at the checkpoint to assist in the investigation and detect controlled substances if necessary.

. . . .

10. That the process of checking the drivers license and registration of each vehicle usually took about 40 seconds.

11. That at some point, at approximately 11:00 p.m., the Defendant, Monica Branch, came through the checkpoint and **[*710]** was asked to produce her driver's license and registration. That she produced a duplicate driver's license. She also produced a registration or other information which indicated the registered owner of the vehicle was the Defendant's sister.

. . . .

14. That based upon Deputy Marshall's experience with Ms. Branch, and the fact that she presented a duplicate license, Deputy Marshall suspected that she did not have a valid permit and he decided to check and verify that her driver's license was valid.

15. That in Deputy Marshall's experience, persons who have lost their driving privileges frequently display duplicate permits.

[925]** 16. That Deputy Marshall was acquainted with Mr. [sic] Branch and had reason to believe that her **[***5]** privilege to drive a motor vehicle was suspended.

***State of North Carolina v. Monica D. Branch*,**
162 N.C. App. 707, 591 S.E.2d 923 (2004)

17. That Deputy Marshall was acquainted with Mr. [sic] Branch and had reason to believe that there were outstanding warrants for her arrest.

18. That Deputy Marshall directed Ms. Branch to pull her vehicle off the roadway while he contacted the Rockingham County Sheriff's Department communications center to verify her driver's license status and to check for any outstanding warrants.

19. That Deputy Marshall spoke to Ms. Branch for approximately 40 seconds prior to directing her to pull over to the shoulder.

20. That during the time Deputy Marshall was contacting the Rockingham County Sheriff's Department communication and performing these checks, Deputy Howell approached her vehicle with his K-9 dog.

21. That Deputy Marshall and Deputy Howell had spoken briefly after Deputy Marshall made the decision to contact communications.

22. That Deputy Marshall had related to Deputy Howell that he had known Ms. Branch to be in possession of controlled substances in the past. Specifically, that he knew that she had, in the past, carried controlled substance on her person. That Deputy **[*711]** Howell was also acquainted with Ms. Branch and was **[***6]** aware of her criminal history.

. . . .

26. Deputy Howell testified that at the time Ms. [Branch] [sic] passed through the checkpoint, he believed that Ms. Branch did not have a valid operating permit and that he communicated this

information to Deputy Marshall. This belief was based upon the fact that he had previously charged Ms. Branch with a moving violation and that to his knowledge, she had failed to appear [in court] in January of 2000. Normally, this would result in the operating privilege being suspended or revoked.

27. That independent of any request from Deputy Marshall, and based upon his prior dealing with Ms. Branch, Deputy Howell decided to approach Ms. Branch's vehicle with his K-9, "Toon". That at the time that Deputy Howell approached the vehicle it was parked on a public roadway.

. . . .

31. That during the time that Deputy Howell was conducting his investigation, Deputy Marshall was in his vehicle checking the status of Ms. Branch's driver's license and checking for possible outstanding process for Ms. Branch.

32. That the Defendant was required to remain in her vehicle for less than 5 minutes while the officers continued their investigation.

33. After **[***7]** the dog alerted Deputy Howell returned the dog to his patrol car and informed Ms. Branch and her passenger that the dog had detected the odor of a controlled substance in the vehicle. Based upon that information, Deputy Howell advised the Defendant that he intended to search the vehicle.

Deputy Howell went on to find 0.6 grams of marijuana in the vehicle, more marijuana in a purse within the vehicle, and a 0.3 gram rock of crack cocaine in the defendant's brassiere.

***State of North Carolina v. Monica D. Branch*, 162 N.C. App. 707, 591 S.E.2d 923 (2004)**

The trial court concluded as a matter of law:

6. That the detention of all vehicles, including the Defendant's vehicle was reasonable in scope and duration.

[*712] 7. That Deputies Marshall and Howell had specific articulable reasons to continue the investigation of the Defendant after the initial stop. Specifically, the continued detention of the Defendant was necessary to determine if she has a valid driver's license, and to determine if there were outstanding warrants for the Defendant.

8. That the duration of her detention to continue the investigation was reasonable and not excessive.

9. That Deputy Howell's conduct in taking his K-9 around the Defendant's vehicle did not constitute a search of an area to which the **[***8]** Defendant had a reasonable expectation **[**926]** of privacy. *State v. Fisher,* 141 N.C. App. 448, 539 S.E.2d 677. . . 141 N.C. App. 448, 539 S.E.2d 677. Citing *Place,* 462 U.S. at 707, 77 L. Ed. 2d at 121, 103 S. Ct. 2637.

10. For the purpose of the sniff, the Deputies did not need to justify the Defendant's detention with reasonable suspicion, based on objective, specific, and articulable facts because the detention did not exceed that which was already necessary to determine if the Defendant had a valid driver's license and to determine if there were outstanding warrants for the Defendant. *State v. McClendon,* 130 N.C. App. 368, 502 S.E.2d 902 (1998), *aff'd,* 350 N.C. 630, 517

***State of North Carolina v. Monica D. Branch*, 162 N.C. App. 707, 591 S.E.2d 923 (2004)**

> S.E.2d 128 (1999), and *State v. Falana,* 129 N.C. App. 813, [817,] 501 S.E.2d 358[,] [360] (1998)[.]

This Court has upheld the constitutionality of a checkpoint which stops for a specified purpose every vehicle that passes, so long as the checks are not random and subject to the officer's unbridled discretion. *State v. Grooms,* 126 N.C. App. 88, 483 S.E.2d 445 (1997); *State v. Sanders,* 112 N.C. App. 477, 435 S.E.2d 842 (1993). **[***9]** The checkpoint in question was a checkpoint designated to check licenses and registrations, and if further evidence was detected of impaired driving or illegal activity, further investigation was conducted according to the instructions given the officers. This is within the constitutional mandates.

The trial court found as fact that the officers had previous knowledge of the defendant and also observed that she had given a duplicate license. According to the case of *State v. Briggs,* 140 N.C. App. 484, 536 S.E.2d 858 (2000), it is proper for an officer's prior knowledge of a defendant, combined with present observations and not taken alone, to constitute a reasonable suspicion justifying further **[*713]** investigation. In *Briggs*, the officer had previously arrested the defendant for possession of controlled substances and knew defendant was on probation at the time of the stop. The officer smelled burned cigar in defendant's vehicle and on defendant, and was aware that burning cigars were commonly used to mask the smell of illegal substances. Defendant had previously stated he did not smoke cigars. His eyes were red and glassy, and his behavior suggested possible usage **[***10]** of a controlled substance. *Briggs,* 140 N.C. App. at 493-94, 536 S.E.2d at 863-64. These

observations added to the officer's prior knowledge of the defendant to justify a patdown search and the confiscation of the fruit of that search, which was a cigar holder containing crack cocaine.

In the case at bar, the prior knowledge and present observations of the officers were not sufficient to justify a dog sniff and search of defendant's car, but were enough to justify the license check. Both deputies suspected that Defendant was carrying a duplicate license because in their memory she had been charged with an offense which would result in the revocation of her license. They had observed in their experience that sometimes when an individual's license had been revoked, the individual may drive with an invalid duplicate which was made prior to the revocation. Prior knowledge of the defendant alone would not constitute such a reasonable suspicion. Neither would the presentation of a duplicate license, standing alone. Both together, however, may form reasonable suspicion to justify investigation of the validity of the license. Such was the case here, and the suspicion related **[***11]** to her driving privileges alone. At that point there were no further observations indicating other illegal conduct by the defendant.

Once the officers had stopped defendant, and she had given them her valid license and registration, some further particularized suspicion was necessary to justify a longer detention. In addition, a reasonable and articulable suspicion is required before a dog sniff, even though it is not a search, is valid. *State v. Falana,* 129 N.C. App. 813, 817, 501 S.E.2d 358, 360 (1998).

***State of North Carolina v. Monica D. Branch*, 162 N.C. App. 707, 591 S.E.2d 923 (2004)**

Likewise, since the canine sniff would not be appropriate beyond the detention because the defendant presented what proved to be a valid license and registration, the canine sniff during the time license and registration checks were conducted is also inappropriate. The time needed to verify defendant's credentials is not a time during which officers may investigate any possible criminal activity while **[*714]** the defendant is immobilized. **[**927]** This would present officers with a free-for-all race against the clock for evidence, guided only by their unbridled discretion, which is unconstitutional.

The U.S. Supreme Court has ruled that:

> An investigative detention must be temporary **[***12]** and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. . . . It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.

Florida v. Royer, 460 U.S. 491, 501, 75 L. Ed. 2d 229, 238, 103 S. Ct. 1319 (1983) (citations omitted).

That same reasoning has been applied in cases such as *State v. McClendon,* 130 N.C. App. 368, 502 S.E.2d 902 (1998) by this Court. Allowing the dog sniff of defendant while she

was detained on suspicion of carrying an invalid license would not be consistent with this reasoning.

We therefore determine that the initial stop was justified, as found by the trial court. The trial court erred, however, in finding that no reasonable suspicion was necessary to conduct the dog sniff and subsequent searches. Because this conclusion is contrary to our caselaw, we must reverse the ruling of the trial [***13] court. We do not reach the second issue raised by the defendant concerning the location of the signing of the order because the first issue is dispositive. The order denying the motion to suppress is therefore

Reversed.
Judges BRYANT and CALABRIA concur.

***State of North Carolina v. Monica D. Branch*,**
359 N.C. 406; 610 S.E.2d 198 (2005)

STATE OF NORTH CAROLINA
v.
MONICA D. BRANCH

No. 95PA04

SUPREME COURT OF NORTH CAROLINA

359 N.C. 406; 610 S.E.2d 198; 2005 N.C. LEXIS 362

November 10, 2004, Heard in the Supreme Court
April 7, 2005, Filed

COUNSEL: Roy Cooper, Attorney General, by William P. Hart, Special Deputy Attorney General, for the State-appellant.

Staples S. Hughes, Appellate Defender, by Barbara S. Blackman, Assistant Appellate Defender, for defendant-appellee.

JUDGES: Justice NEWBY did not participate in the consideration or decision of this case.

OPINION:

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 162 N.C. App. 707, 591 S.E.2d 923 (2004), reversing an order denying a motion to suppress entered 29 August 2002 by Judge Anthony M. Brannon in Superior Court, Rockingham County. Heard in the Supreme Court 10 November 2004.

***State of North Carolina v. Monica D. Branch*,**
359 N.C. 406; 610 S.E.2d 198 (2005)

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice NEWBY did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA

v.

MONICA D. BRANCH

No. 95PA04

SUPREME COURT OF NORTH CAROLINA

2005 N.C. LEXIS 451

April 26, 2005, Decided

COUNSEL: Mr. William P. Hart, Special Deputy Attorney General, NC Dept. of Justice, Raleigh, NC.

Ms. Barbara S. Blackman, Assistant Appellate Defender, For Branch.

JUDGES: Newby, J.

OPINIONBY: Newby

OPINION:

The following order has been entered on the motion filed on the 25th day of April 2005 by Attorney General to Stay Mandate, to Reconsider, or to Remand to Court of Appeals:

"Motion Denied by order of the Court in conference this the 26th day of April 2005.

s/ Newby, J.
For the Court"

(2)

DO NOT REMOVE FROM LL BR

No. 05-134

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2004

****

STATE OF NORTH CAROLINA,

Petitioner

v.

MONICA D. BRANCH,

Respondent

****

On Petition for a Writ of Certiorari
To The North Carolina Court of Appeals

****

RESPONDENT'S BRIEF IN OPPOSITION

****

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QUESTION PRESENTED

Whether the North Carolina Court of Appeals correctly ruled that conducting a canine sniff at a driver's license checkpoint, absent reasonable suspicion, exceeds the scope of a *Terry* stop?

TABLE OF CONTENTS

QUESTION PRESENTED..... i

TABLE OF CASES AND AUTHORITIES..... iii

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE PETITION..... 4

Illinois v. Caballes does not control dog sniffs conducted at driver's license checkpoints. The North Carolina Court of Appeals was correct that dog sniffs cannot be conducted at *Terry* stops absent reasonable suspicion..... 4

CONCLUSION..... 8

TABLE OF AUTHORITIES

Cases

Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)..... 5

City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000)..... 6,7

Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)..... 4

Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)..... 5

Illinois v. Caballes, __ U.S. __, 125 S.Ct. 834, 125 L.Ed.2d 842 (2005)..... 7

State v. Milien, 144 N.C. App. 335, 548 S.E.2d 768 (2001)..... 5

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)..... 4,5,7

United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)..... 4

United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985)..... 5

Constitution

United States Constitution

Amendment IV..... 5
Amendment XIV..... 5

STATEMENT OF THE CASE

A. Testimony Elicited at the Hearing on Ms. Branch's Motion to Suppress.

On 4 November 2000, the Community-Oriented Policing Unit (hereinafter "COP") of the Sheriff's Department of Rockingham County, North Carolina established a checkpoint at the intersection of four highways not known for a high level of drug activity. (Mp. 6, 30) "COP" was responsible on a daily basis for investigating street level drug activity and was assisted in conducting drug investigations by trained narcotics-detection dogs. (Mp. 16, 18) The 4 November 2000 checkpoint, established for the announced purpose of stopping all oncoming traffic to verify driver's licenses and vehicle registrations (Mp. 6), was staffed by "COP" deputies, two canine ("K-9") officers and their dogs, and various patrol units. (Mp. 4, 15, 37)

According to "COP" Deputy Marcus Marshall, each vehicle was to be stopped for approximately forty seconds in order for the driver to produce a license and vehicle registration. (Mp. 35) An officer could pull a vehicle out of the checkpoint if the driver failed to produce a license, produced a license or registration with facial violations, was subject to outstanding warrants, or if the officer detected the odor of alcohol or illegal substances. (Mp. 15-16, 27, 35) If a vehicle was pulled out of the checkpoint for a computer license check, the officer could extend the duration of the stop by requesting a warrant check. (Mp. 15, 36)

The "K-9" officers were posted at two of the four checkpoint stations and were idle until an officer checking vehicles called for their assistance. (Mp. 37-38) Deputy Marshall testified that the narcotics-detection dogs were present to assist officers who smelled alcohol or illegal substances. (Mp. 15) When asked why the dogs were needed if officers were only pulling out vehicles which emitted smells the officers detected, Marshall responded, "There may be instances where we have been familiar with people that have used narcotics substances or are

known drug users or known drug sellers." (Mp. 16) As to people recognized by police as having "been involved with drugs or always in high drug areas," (Mp. 34) Marshall stated:

> Most of the time when we ask for the license and registration, if they can produce that, we still do our investigative stop, as far was [sic] where are you going; where you coming from. It just depends on the situation. Each situation is different. (Mp. 34)

Monica Branch stopped at the checkpoint manned by Deputy Marshall. She produced a facially valid duplicate driver's license and the vehicle registration. (Mp. 24) Marshall recognized that the license was valid (Mp. 24), but decided that her presentation of a duplicate license "gave me enough to pull her over to get her checked." (Mp. 27) He did not testify that he knew or suspected that Ms. Branch's license had been revoked and that she presented a duplicate license to avoid revealing her true driving status. Instead, he testified that "there are times we have people to [sic] come through with a valid license and their license is revoked." (Mp. 25) He claimed he also needed to see if Ms. Branch was subject to outstanding warrants. (Mp. 27) He did not testify that he knew of any outstanding warrants on Ms. Branch. Rather, he testified that he pulled out drivers "if it's someone that we think we have warrants on...." (Mp. 27)

After Marshall pulled Ms. Branch out of the checkpoint, he showed her license to "K-9" Deputy Randy Howell. Howell also recognized that the license was facially valid. (Mp. 39) As he had arrested Ms. Branch ten months before for "a violation for which I felt her license could have been revoked," he concurred that it was best to check the license status. (Mp. 39, 51) Marshall asked Howell to step over to Ms. Branch's vehicle with his narcotics-detection dog, although Marshall had not smelled alcohol or illegal substances. (Mp. 28-30) The only

circumstance Marshall cited as supporting his decision to conduct a drug investigation was his knowledge of

> the past history of Ms. Branch. I knew that she had been – that she had used illegal substances before. I've known Ms. Branch as being in high crime drug areas, areas in my area of the county that I work, which is the south side of Reidsville; and that was another reason I had Deputy Howell to step over to the vehicle. (Mp. 29)

Marshall knew that a license and warrant check would take several minutes. (Mp. 36) He asked Howell to step over to the car while the check was in process. (Mp. 28) Within five minutes, dispatch advised Marshall that Ms. Branch's license was valid and no outstanding warrants against her existed. (Mp. 26, 28, 30) When he informed Howell of the dispatch results, the two discussed something that Marshall could no longer recall. (Mp. 32) Howell then told him that his dog had alerted to the presence of narcotics. (Mp. 32-33) Marijuana stems and butts were found in the vehicle ashtray (Mp. 44-46), 0.6 grams of marijuana was found in a container in Ms. Branch's purse (Mp. 47-48), and 0.3 grams of cocaine was found inside Ms. Branch's brassiere. (Mp. 50)

B. How the Question was Presented on Direct Appeal.

Ms. Branch challenged the legality of Deputy Marshall's decisions (1) to pull her out of the checkpoint upon her presentation of a facially valid driver's license and (2) to conduct a narcotics investigation. The North Carolina Court of Appeals ruled that Ms. Branch was lawfully pulled out of the checkpoint, but that Marshall's decision to conduct a drug investigation in the absence of reasonable suspicion violated *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *State v. McClendon*, 130 N.C. App. 368, 502 S.E.2d 902 (1998); and *State v. Falana*, 129 N.C. App. 813, 501 S.E.2d 358 (1998).

The State of North Carolina filed a Petition for Discretionary Review in the North Carolina Supreme Court challenging the ruling regarding the drug investigation. Ms. Branch filed a combined Petition for Discretionary Review on the lawfulness of the detention and a Response to State's Petition. On 1 April 2004, the North Carolina Supreme Court accepted the State's Petition for Discretionary Review and denied Ms. Branch's Petition. On 7 April 2005, after full briefing and oral argument, the Supreme Court dismissed review of the State's Petition as improvidently granted. The State's request for rehearing was denied on 26 April 2005.

REASONS FOR DENYING THE WRIT

ILLINOIS v. CABALLES DOES NOT CONTROL DOG SNIFFS CONDUCTED AT DRIVER'S LICENSE CHECKPOINTS. THE NORTH CAROLINA COURT OF APPEALS CORRECTLY DECIDED, IN ACCORDANCE WITH PRECEDENT OF THIS COURT, THAT DOG SNIFFS CANNOT BE CONDUCTED AT *TERRY* STOPS ABSENT REASONABLE SUSPICION.

This Court has made clear that motorists are not at the mercy of the police every time they start their automobiles.

> Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry v. Ohio*, [392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)], recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.

Delaware v. Prouse, 440 U.S. 648, 662-663, 99 S.Ct. 1391, 1400-1401, 59 L.Ed.2d 660, 673 (1979). While police may stop motorists at license or sobriety checkpoints, the "principal protection of the Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop." *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-557, 96 S.Ct. 3074,

3087, 49 L.Ed.2d 1116, 1133 (1976). The North Carolina Court of Appeals correctly ruled, in accordance with precedent of this Court, that conducting a canine sniff of a driver and her vehicle at a license checkpoint exceeded the appropriate limitations on police conduct, who are limited by the Fourth Amendment to conducting only such investigation "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, *supra*, 392 U.S. at 20, 88 S.Ct. at 1879, 20 L.Ed.2d at 905.

In *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325-1326, 75 L.Ed.2d 229, 238 (1983), quoted by the Court of Appeals in resolving this issue, this Court stated:

> The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.

When the scope of a *Terry* stop is exceeded in either its duration or the investigation performed, the seizure is unreasonable and therefore unconstitutional under the Fourth and Fourteenth Amendments to the United States Constitution, *United States v. Sharpe*, 470 U.S. 675, 685, 105 S.Ct. 1568, 1575, 84 L.Ed.2d 605, 615 (1985), as the right to detain does not confer a corresponding right to "discover evidence of crime...." *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612, 617 (1972).

Deputy Marshall testified that police were conducting a driver's license checkpoint. (Mp. 4) He testified that signs were posted on the highways alerting drivers that they were approaching a license checkpoint. (Mp. 6) He testified that this was not a warrant checking station (Mp. 26), but claimed that police can always stop any driver at any time when they know or suspect that the driver is subject to outstanding warrants. (Mp. 27)

Ms. Branch, however, was subjected to a narcotics investigation while her license and warrant status were being checked. Deputy Marshall's decision to conduct a narcotics investigation was not pursuant to any programmatic purpose, since he did not testify that this was a narcotics interdiction checkpoint or that any guidelines governed an officer's decision-making process as to when and how to conduct a narcotics investigation at a license checkpoint. *Cf. City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). Marshall did not testify that all cars stopped at the checkpoint were subjected to a canine sniff or even that all cars pulled out of the checkpoint were subjected to a canine sniff. He simply decided "pretty much of my own initiative" to conduct this narcotics investigation (Mp. 41), since he happened to have been able to detain Ms. Branch by virtue of her stopping at the checkpoint.

This was a classic violation of *Terry*. Narcotics dogs could lawfully have been utilized at this license checkpoint only if they constituted an investigative method capable of verifying or dispelling an officer's suspicion as to the validity of a driver's license. While Howell testified that the narcotics-detection dogs were indeed "busy checking licenses" at the checkpoints (Mp. 38), a claim that the dogs assisted in license checks is preposterous. As intelligent and resourceful as dogs may be, they could not possibly have assisted police in determining the licensing or registration status of any motorist or vehicle. Narcotics-detection dogs perform one task and one task alone: assisting in the gathering of evidence of drug-related criminality. The dogs were thus used for a purpose unrelated to the reason for the detention and used wholly at the unbridled discretion of individual officers.

Police may "act appropriately upon information that they properly learn during a checkpoint stop justified by a lawful primary purpose, even where such action may result in the arrest of a motorist for an offense unrelated to that purpose." *City of Indianapolis v. Edmund*,

supra, 531 U.S. at 47, 121 S.Ct. at 457, 148 L.Ed.2d at 347. As in any *Terry* stop, the reasonableness of such police action is determined not by the officer's "inchoate and unparticularized suspicion or 'hunch,' but [by] the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry v. Ohio*, *supra*, 392 U.S. at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909. Deputy Marshall did not testify to a single objective circumstance justifying expanding the scope of this checkpoint stop to a narcotics investigation. He did not testify that Ms. Branch took evasive action to try to avoid stopping at the license checkpoint. He did not testify that she was unable to properly operate her car. He did not testify that she was glassy-eyed or nervous, avoided eye contact, provided inconsistent information, or refused to produce the requested documents. He did not testify that he smelled any odor associated with narcotics. He simply claimed the right to conduct the investigation because he wanted to. The United States Constitution did not give him that right.

Although *Illinois v. Caballes*, __ U.S. __, 125 S.Ct. 834, 125 L.Ed.2d 842 (2005), had not been decided when the opinion issued in this case, *Caballes* does not affect the analysis the Court of Appeals used. *Caballes* was not a license checkpoint case. *Caballes* was not a *Terry* stop case. Mr. Caballes was stopped upon probable cause after having been observed violating traffic laws by speeding on the highway. During the period of time in which he was detained for initiation of the criminal process, police conducted a canine sniff of his vehicle. As this Court noted, the *certiorari* grant in *Caballes* was very narrow, *id.* at 837, 160 L.Ed.2d at 846, and its holding likewise very narrow. As Justice Souter noted in dissent, the narrowness of the Court's holding does not signal "recognition of a broad authority to conduct suspicionless sniffs for drugs in any parked car...." *Id.* at 842, 160 L.Ed.2d at 852.

The decision by the Court of Appeals herein was consistent with decades of *Terry* stop cases and with this Court's rejection in *City of Indianapolis v. Edmond* of narcotics-detection checkpoints. Accordingly, no grounds exist to grant *certiorari*.

CONCLUSION

For the foregoing reasons, this Court should decline to grant *certiorari* to review the issue presented by the Petitioner.

Respectfully submitted, this the 15th day of August, 2005.



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No. 05-134

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2004

****

STATE OF NORTH CAROLINA,

Petitioner

v.

MONICA D. BRANCH,

Respondent

****

CERTIFICATE OF SERVICE

****

I, Barbara S. Blackman, a member of the bar of this Court, hereby certifies under penalty of perjury that on the 15th day of August, one copy of the Brief in Opposition to Petition for Writ of Certiorari and Ms. Branch's Request to Proceed *In Forma Pauperis* in the above-entitled case were served on William P. Hart, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, counsel for the Petitioner herein, by first-class mail, postage prepaid. I further certify under penalty of perjury that all parties required to be served have been served.

Respectfully submitted, this the 15th day of August, 2005.

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